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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GARY GREENE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

HARRY L. GRANT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

RONALD A. MAY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

G. WILLIAM BAAB
8204 Elmbrook, Suite 200
Dallas, Texas 75247
(214) 630-3672
Counsel for Petitioners,
Gary Greene, Harry L. Grant,
and Ronald A. May

Of Counsel:
MULLINAX, WELLS, BAAB,
& CLOUTMAN, P.C.
8204 Elmbrook Drive
Suite 200
Dallas, Texas 75247

QUESTIONS PRESENTED

1.

Is a statute which on its face purports to criminalize violation of a prohibition against employment of individuals who strike against the Government of the United States, but which is instead interpreted and applied by the Justice Department and lower courts to criminalize strikes by individuals previously employed by the Government, unconstitutionally vague in violation of the Fifth Amendment's Due Process clause?

2.

Where criminal defendants establish *prima facie* that they have been improperly selected for criminal prosecution because of their status as union officers, may lower courts ignore rules ordinarily governing the determination of whether a *prima facie* showing of improper selection has been made, disregard the Government's refusal to articulate any legitimate basis for its selection of those defendants for prosecution, and without support in record evidence hold that union officers are properly selected for prosecution because they are assumed to be "strike leaders"?

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Petitioners Gary Greene, Harry L. Grant, and Ronald A. May, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the

Fifth Circuit entered in the above consolidated cases on January 31, 1983, and the subsequent denial of Petition for Rehearing and Suggestion for Rehearing En Banc on April 4, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals on Petitions for Rehearing, as yet unreported, is reproduced in the Appendix hereto (App. p. A-1).[1]

The original opinion of the Court of Appeals, entered on January 31, 1983, and reported at 697 F.2d 1229 (5th Cir. 1983), is reproduced in the Appendix at (App. pp. A-2-22).

The District Court's ruling on Petitioners' Motion To Dismiss their Indictments, entered on November 16, 1981, but unreported, is reproduced in the Appendix at (App. pp. A-23-28).

The District Court's adjudication of Petitioners, following a jury's verdict of guilty as to each, is unreported but reproduced in the Appendix at (App. pp. A-28-33).

JURISDICTION

The judgment of the Court of Appeals in these consolidated cases was entered on January 31, 1983. Petition for Rehearing and Suggestion for Rehearing En Banc were denied on April 4, 1983. (App. p. A-2). This Petition for Certiorari is being filed within sixty days of the latter date. This Court's jurisdiction is accordingly invoked under Title 28 U.S.C. Section 1254(1).

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[1] The appendix to this Petition follows the Petition in a single volume, and designation thereto is by the notation "App." followed by pagination "p. A-1, etc."

QUESTIONS PRESENTED

1.

Is a statute which on its face purports to criminalize violation of a prohibition against employment of individuals who strike against the Government of the United States, but which is instead interpreted and applied by the Justice Department and lower courts to criminalize strikes by individuals previously employed by the Government, unconstitutionally vague in violation of the Fifth Amendment's Due Process clause?

2.

Where criminal defendants establish *prima facie* that they have been improperly selected for criminal prosecution because of their status as union officers, may lower courts ignore rules ordinarily governing the determination of whether a *prima facie* showing of improper selection has been made, disregard the Government's refusal to articulate any legitimate basis for its selection of those defendants for prosecution, and without support in record evidence hold that union officers are properly selected for prosecution because they are assumed to be "strike leaders"?

STATUTE INVOLVED

Title 18 U.S.C. Section 1918, the statute at issue, provides:

> Whoever violates the provision of Section 7311 of Title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—
>
> (1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000.00 or imprisoned not more than one year and a day, or both.

STATEMENT OF THE CASE

A.
The Facts

These criminal cases arose in the context of a nation-wide work stoppage, alleged to be an illegal strike, on the part of individuals previously employed by the Federal Aviation Administration (FAA) as air traffic control specialists, beginning on August 3, 1981. Prior to that date, petitioners were employed in that capacity in the Dallas-Fort Worth area.

From among more than two hundred fifty (250) air traffic control specialists alleged to have participated in the work stoppage in the Dallas-Fort Worth area, six (6), including petitioners, were singled out by the Government for prosecution under Title 18 U.S.C. Section 1918. (See pp. 3-4 *supra*). Of the six individuals selected by the Government for prosecution, five (5) were then officers of local unions of the Professional Air Traffic Controllers Organization (PATCO). Petitioners Greene and Grant were, respectively, presidents of PATCO Local Unions 442 and 402. The sixth, Petitioner May, was immediate past president of PATCO Local Union 402, and had held that position until June, 1981.

B.

The Motions To Dismiss The Indictments

Petitioners and the other individuals selected for prosecution filed Motions To Dismiss the Indictments against them, contending *inter alia* that: (1) Title 18 U.S.C. Section 1918 was unconstitutionally vague; and (2) that the Government had impermissibly selected them for prosecution based, in part, on their status as PATCO local union officers.

At hearing on the Motions To Dismiss, petitioners and the others selected for prosecution introduced evidence that: (1) In the Dallas-Fort Worth area, only present or (in petitioner May's case) past PATCO local union officers were selected for prosecution, although more than 250 air traffic control specialists were alleged to have participated in the illegal work stoppage; (2) in investigation prior to the issuance of criminal complaints and indictments, FBI agents sought and obtained information that those selected for prosecution were local PATCO officers; and (3) insofar as affidavits supporting the issuance of criminal complaints were prepared and filed by the FBI, status of those selected for prosecution as union officers was explicitly cited as a basis for the issuance of criminal complaints against them.[2]

At hearing on the Motions To Dismiss the Indictments, the Government declined to introduce evidence articulating a basis for its selection of petitioners and the others for prosecution.

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[2]No criminal complaint nor supporting affidavit was prepared or filed concerning petitioner May. His selection for prosecution was first made public by his indictment.

C.
The Trial Court's Disposition of Petitioners' Motions To Dismiss The Indictments

On November 16, 1981, the District Court denied the Motions To Dismiss the Indictments.

Tacitly acknowledging that, on its face, Section 1918 proscribes employment of strikers and not strikes by employees, the trial court stated "the Court admits and agrees that the language of this statute is not the best-worded statute in the books . . . . It is maybe not as clear as possible or at least as clear as some of the prior statutes in this section . . . ." But the trial court declined to hold Title 18 U.S.C. Section 1918 unconstitutionally vague, stating that the statute gave "fair warning that if (any one of the PATCO strikers) participated in a strike they would be subject to criminal penalty". (App. p. A-26).

As to the selective prosecution issue, the trial court found that petitioners and the others had proved that "they were singled out among the 250 strikers for prosecution, and all 250 committed the same act . . . ." But, said the trial court, petitioners and the others had not shown "that they were singled out for any invidious reasons, or that the government acted in bad faith in bringing cases against these six . . . ." Thus, it held that petitioners and the others "were not impermissibly selected for prosecution." (App. p. A-28). The trial court did not address the legal standard applicable to determination of whether a *prima facie* showing of impermissible selection had been made, or the legal effect of the Government's failure to submit evidence explaining the basis for its selection of petitioners and others for prosecution.

Petitioners were subsequently found by juries to have violated Title 18 U.S.C. Section 1918, adjudicated guilty, and sentenced by the District Court. (App. pp. A-28-33).[3]

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[3]The other three air traffic control specialists selected for prosecution ultimately opted to plead guilty to a lesser misdemeanor charge.

D.
The Court of Appeals' Opinion

On appeal, petitioners continued to contend, *inter alia*, that: (1) Title 18 U.S.C. Section 1918 was and is unconstitutionally vague; and (2) that they had been impermissibly selected for prosecution.

The Court of Appeals did not meaningfully address the proposition that on its face, Section 1918 prescribes only the employment of strikers, and that if interpreted and applied to criminalize strikes by employees, the statute is unconstitutionally vague. Rather, considering the constitutional issue in conjunction with the related claim that the indictments against petitioners failed to state facts constituting a crime, the Court of Appeals reasoned that: (1) Title 18 U.S.C. Section 1918 "is quite plainly a criminal statute;" (App. p. A-7); (2) "concern for efficiency" and "logic" dictate the conclusion that Congress intended to make strikes by government employees a crime under Section 1918; (App. p. A-8); and (3) although Section 1918 on its face prohibits employment of strikers, "the fact that it makes an individual's violation of its provision a crime" leads to the conclusion that it gives "fair warning to federal employees that no person may strike against the government while holding a government job without being subject to criminal prosecution and penalties" (App. pp. A-10-11).[4]

The Court of Appeals similarly brushed aside contentions that Section 1918 is unconstitutionally vague by virtue of its failure to specify the time relation of the proscription against

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[4]The Court of Appeals also found support for its conclusion that the statute gives notice of intent to punish federal employees who strike (as opposed to sanctioning employment of strikers) by reference to a statutory requirement that all government employees sign an affidavit promising not to participate in a strike while an employee of the United States (See App. pp. A-10-11 fn.6).

"hold(ing) a position" to "participat(ion) in a strike" (before, after, or during), stating that there is "no statutory or judicially imposed requirement that every statute include a specific time table for its violation." (App. p. A-12). In this respect, the Court of Appeals again ignored the facial import (and ambiguity) of the statute.

In regard to petitioners' claims of impermissible selective prosecution, the Court of Appeals failed to articulate or to address the legal standard for determining whether petitioners had made a *prima facie* showing that one of the bases for their selection for prosecution was their status as union officers. Instead, the Court of Appeals simply concluded that "taken as a whole, the evidence tends to establish that the government instituted prosecutions of Greene, Grant, and May because (they) were strike leaders, not because of their status as union officials. . . . We conclude on the basis of the record before us, that (they) have not proven they were prosecuted for their protected union activities, rather than for their actions as leaders and organizers of an illegal strike." (App. pp. A-20-22). In attempting to cite record evidence in support of this conclusion, the Court of Appeals could refer only to the testimony of FAA supervisors that petitioners "all actively participated in the August 3 strike" and that the FBI agents investigating preliminary to criminal prosecution "could have assumed that (one of petitioners) had urged his members to strike" (App. p. A-21).[5] In short, the Court of Appeals seemed to *assume*

[5]The Court of Appeals on its initial opinion also referred to material which the trial court inspected *in camera* but which was not made available to counsel for petitioners nor introduced in the record as support for its conclusion that petitioners were prosecuted as "strike leaders". In denying Petition for Rehearing, the Court of Appeals denied that it had relied on these non-record materials in reaching its conclusion, but left standing other references to non-record considerations as basis for its determination that petitioners were permissibly prosecuted as "strike leaders". (App. pp. 2, A-21-22, fn.15).

that union officers were strike leaders, and justified petitioners' selective prosecution on the basis of that assumption.

REASONS FOR GRANTING THE WRIT

The importance of the questions presented in this petition is self-evident. The August, 1981 PATCO strike has been broadly characterized as a grave threat to the national interest, and the criminal prosecution of a relatively small number of individuals, among the thousands alleged to have participated in the strike, has been described by responsible Government officials as justifiable and even necessary prophylactic policy.

On the other hand, this Court has long acknowledged and guarded the rights of individuals in applying the procedure and substance of the criminal law. The rights of individuals to due process and equal protection in the administration of the criminal law have never been held to depend on whether acknowledgment of those rights is favored by public opinion, or on a court's view of the "national interest". Public opinion which decries strikes by government employees cannot justify prosecution of strikers under a statute which does not pass constitutional muster. National interest, whatever its content or scope, does not justify the selective prosecution of union officers on the "assumption" that they must be strike leaders.

The prosecution of individuals by interpretation and application of a criminal statute inconsistent with its plain facial meaning is a matter of grave concern. Likewise, selection of only union officers for criminal discipline, in the absence of any other government explanation for selection, is at odds with basic principles recently reiterated by this Court.[6]

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[6]See *Metropolitan Edison Co. v. NLRB*, ___ U.S. ___, 51 U.S.L.W. 4350 (U.S. April 4, 1983).

The need for the Court to address the questions presented here is, if anything, enhanced by the government's asserted interest in preventing future strikes by government employees. If such strikes are to be prevented, let it be done according to what the law requires.

1.

The compelling problem raised by petitioners' due process claim is that the lower courts, in interpreting and applying Section 1918 to make strikes by federal employees a crime, have departed from the plain language and facial meaning of the statute. The statute, making violation of 5 U.S.C. Section 7311 a crime, first identifies prohibited conduct—"accept or hold a position", and then identifies a condition under which such conduct is prohibited—"if he . . . participates in a strike . . . against a Government of the United States . . . ." Giving the language its ordinary meaning, the condition—participation in a strike—is one *precedent* to proscription of the conduct ("accept or hold a position"). Logically, the statute's proscription reads, if an individual participates in a strike, then he may not hold or accept a position, and if he does so, he commits a crime. What is reasonably and logically prohibited by the language of the statute as it is written is an individual's obtaining (or, arguably, seeking to obtain) federal employment *after* he participates in a strike against the Government. The statute simply cannot be said to give reasonable notice that a federal employee's participation in a strike against the Government is, in itself, a crime when the plain language of Section 1918 suggests that *subsequent* conduct, in the form of accepting or holding employment, is necessary to trigger criminal sanction.

As we have said, the Court of Appeals failed meaningfully to address Section 1918's plain language and facial meaning. Instead, it conclusorily stated: the civil statute (Title 5 U.S.C. Section 7311) on its face prohibits employment of strikers;

therefore it prohibits strikes; and therefore, the criminal statute which punishes violation of the civil statute makes the act of striking, in itself, a crime, even though it does not say so. This, the Court of Appeals suggests, is what Congress intended. (See App. pp. A-7-8). But that is mere arbitrary conclusion.[7] It does not explain or excuse transformation of what is written as a condition precedent (participation in a strike) into a prohibited act. It does not justify disregard of the statute's plain language or facial import.

We agree with the Court of Appeals that "to pass constitutional muster, a statute must giver persons of ordinary intelligence fair notice that their contemplated conduct is forbidden by statute." (App. p. A-10, citing cases). But the cases also provide that fundamental principles of due process "mandate that no individual be forced to speculate at peril of indictment, whether his conduct is prohibited," *Dunn* v. *United States*, 442 U.S. 100 at 112 (1979), citing e.g. *Grayned* v. *City of Rockford*, 408 U.S. 104 at 108 (1972); *United States* v. *Harriss*, 347 U.S. 612 at 617 (1954), and that a criminal statute's proscription must be "plain and unmistakable". *Dunn* v. *United States, supra* at 112.

No case cited by the Court of Appeals as defining the due process standard suggests that a statute may properly be construed at odds with its plain language and facial meaning. No case of which we are aware suggests that departure from a

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[7] We earnestly submit that the "logic" underlying other lower courts' similar conclusion that Section 1918 is not unconstitutionally vague is no less arbitrary. See *United States* v. *Taylor*, ____ F. 2d ____, Nos. CA-1753 and 1754 (9th Cir. Dec. 1982); *United States* v. *McDonald*, 553 F. Supp. 1003 (S.D. Texas 1983); *United States* v. *Amato*, 534 F. Supp. 1190 (E.D.N.Y. 1982); *United States* v. *Haggerty*, 528 F. Supp. 1286 (D. Colo. 1981). See also, e.g., *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C. 1971) aff'd mem. 404 U.S. 802 (1971); *Air Traffic Ass'n* v. *PATCO*, 516 F. Supp. 1108, aff'd 667 F.2d 316 (2d Cir. 1981).

statute's plain language and facial meaning is justified by considerations of national interest, public opinion, or a court's view of "what Congress really meant to do".

And it is significant that the Government did not, until the air traffic controllers' strike of 1981, institute criminal prosecution under Title 18 U.S.C. Section 1918, even though federal employees have engaged in striking activities a number of times since that statute was enacted.[8]

Insofar as the national interest may now be said to justify criminal prosecution of federal employees who engage in strikes, this Court is compelled to address the fact that the statute upon which prosecutors would rely does not specifically provide for such prosecution.

2.

The Court of Appeals committed equally serious error, warranting review, in regard to petitioners' claim of impermissible selective prosecution.

The Due Process Clause of the Fifth Amendment applies the concept of equal protection of the laws to the federal government. *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1952). A federal defendant is therefore furnished with protection against discriminatory federal prosecution under an otherwise valid federal statute. See *United States* v. *Falk*, 479 F.2d 616,

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[8]The following cases represent alleged strike activity where the Government did not seek criminal penalties. *Air Transport Ass'n* v. *PATCO*, 453 F.Supp. 1287 (E.D. N.Y. 1978), aff'd 594 F.2d 851 (2nd Cir. 1978), *cert. denied*, 441 U.S. 994 (1979); *Air Transport Ass'n* v. *PATCO,* 313 F.Supp. 181 (E.D. N.Y.), *rev'd in part on other grounds*, 438 F.2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *United States* v. *Branch 60, National Ass'n of Letter Carriers*, 312 F.Supp. 619 (D. Conn. 1970); *Tennessee Valley Authority* v. *Local 110, Sheet Metal Workers' Int'l Ass'n*, 233 F. Supp. 997 (W.D. Ky. 1962).

618 (7th Cir. 1973);*United States* v. *Steele,* 461 F.2d 1148, 1151 (9th Cir. 1972). See also, *United States* v. *Tibbetts,* 646 F.2d 193 (5th Cir. 1981); *United States* v. *Lichenstein,* 610 F.2d 1272 (5th Cir. 1980); *United States* v. *Johnson,* 577 F.2d 1304 (5th Cir. 1978).

In *Yick Wo* v. *Hopkins,* 118 U.S. 356 at 373-74 (1886), this Court articulated the rationale underlying the constitutional prohibition against discriminatory enforcement of criminal law:

> though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

The Court of Appeals acknowledged that petitioners had made a showing that they had "been singled out for prosecution while others similarly situated in committing the same acts (had) not." (App. p. A-). If petitioners then made a *prima facie* showing "that the Government's discriminatory selection of (them) for prosecution (was) . . . based on (some) impermissible consideration . . .," it was incumbent on the Government to come forward with evidence to explain why they were singled out for prosecution. E.g., *United States* v. *Berrios,* 501 F.2d 1207, 1211-12 and especially fn. 4 (2nd Cir. 1974); *United States* v. *Falk,* 479 F.2d 616 at 620-21 (7th Cir. 1973). See also e.g., *United States* v. *Johnson,* 577 F.2d 1304 at 1308 (5th Cir. 1978; *United States* v. *Steele,* 461 F.2d 1148 at 1151-52 (9th Cir. 1972).

Petitioners have consistently argued that their selection for prosecution was based on their status as present or former union officers, and their evidence at hearing on the motions to

Dismiss went to support that claim. The Court of Appeals admitted that status as a union officer constitutes protected activity, and is an impermissible basis for selection for prosecution. (App. p. A-18)[9] The appellate court's obligation was thus to determine whether petitioners made a *prima facie* showing that their status as union officers was basis for their selection for prosecution.

The Court of Appeals' Opinion does not meaningfully address[10] the standard required for a *prima facie* showing of selection for prosecution based on an impermissible standard. We find no conclusive definition of the standard in Supreme Court law, at least as it applies to impermissible selective prosecution.[11]

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[9]The Court of Appeals suggests that petitioners "cannot be prosecuted *solely* on the basis of their status as union officials." (Emphasis added). (App. p. A-18). In fact, there is no case law specifying that the impermissible basis be the "sole" criterion for selection. Analogous case law suggests that the impermissible factor need only be shown to be a substantial or motivating factor in the decision at issue (here, the decision to prosecute) to trigger the requirement that the Government come forward with evidence to show that the same decision would have been reached absent reliance on the impermissible factor. *Mount Healthy City School District Board of Education* v. Doyle, 429 U.S. 274 at 287 (1977).

[10]Certainly the discussion of evidence in *United States* v. *Falk, supra,* and *United States* v. *Steele, supra* (App. pp. A-16-18) is no substitute for articulation of the standard for a *prima facie* showing and application of the standard to the facts of this case, something the Court of Appeals did not do. These factual recitations reduce to a "distinction without a difference."

[11]In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court refers to proof of a *prima facie* case "by a preponderance of the evidence" (*Id.* at 252-53) and later (citing *Furnco Const. Corp.* v.

(footnote continued on next page)

Certainly the Court of Appeals errs in implying that the Ninth Circuit in *United States* v. *Steele, supra* held that a *prima facie* showing requires "evidence creating a strong inference . . . ." A fair reading of *Steele* shows that in referring to a "strong inference" the Ninth Circuit was *describing* the evidence in that case, and *not* defining the *prima Facie* showing which was required.

In *United States* v. *Falk, supra*, on which the Court of Appeals otherwise relies, the Seventh Circuit held that the *prima facie* showing required: ". . . facts sufficient to raise a reasonable doubt about the prosecutor's purpose . . . ." *Id.* at 620-21. Likewise, the Fifth Circuit has written that a *prima facie* showing consists of "evidence, circumstantial or direct, from which a fact finder might reasonably conclude . . ." that a decision (here, selection for prosecution) was based on impermissible criteria. *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981). See also, *Baldwin* v. *Sears, Roebuck & Co.*, 667 F.2d 458, 462 (5th Cir. 1982). The Court of Appeals should have determined whether, at hearing on the Motions to Dismiss, petitioners submitted evidence sufficient

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(footnote continued)

Waters, 438 U.S. 567 at 577 (1978)), to the *prima facie* case "raising an inference . . ." only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." (*Id.* at 254). This Court also distinguished between "prima facie case" as a legally mandatory, rebuttable presumption and "enough evidence to permit the trier of fact to infer the fact at issue," stating that "in the Title VII context we use "prima facie case" in the former sense. *(Ibid.* fn. 7). But see relevant *infra* to *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982).

Clearly, lower courts writing in the area of impermissible selective prosecution have used the term "prima facie case" in the sense of "enough evidence to permit the trier of fact to infer the fact at issue". (See discussion and cases cited pp. 15-17 *infra.*)

to permit a "reasonable inference" that they were selected for prosecution based on their status as past or present union officers.

Under the recited standard, petitioners made a *prima facie* showing of improper selection for prosecution. A uniform pattern of selecting for prosecution only union officers or immediate past union officers is in evidence. There is evidence that investigating FBI agents sought and obtained information as to the identity of local union officers in preparing the Government's case for prosecution. In affidavits which state "the basis" for criminal complaints preliminary to indictment, the Government uniformly recited that those being prosecuted were local union officers. The recited evidence clearly raised a "reasonable doubt" or "reasonable inference" that petitioners were selected for prosecution because they were union officers.

Evidence which permits a "reasonable inference" of improper selective prosecution need not be evidence which ultimately persuades the finder of fact. Considering in detail the parameters of a "*prima facie* case" in a Title VII context, the Ninth Circuit wrote: "As an inference, it can but need not result in an ultimate judgment for the Plaintiff. In other words, a *prima facie* case . . . is one in which the Plaintiff has met his immediate burden of production, but *not necessarily his ultimate burden of persuasion.*" (Emphasis added). *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 at 543, n. 10 (9th Cir. 1982). Cf. *United Postal Service Board of Governors* v. *Aikens*, ____U.S.____, 51 U.S.L.W. 4354 at 4355-56 (U.S. April 4, 1983); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 at 253-56 (1981).

The Court of Appeals confused its appointed task of determining whether petitioners had made a *prima facie* showing with its apparent determination that petitioners' *prima facie* showing was not ultimately persuasive. It purportedly viewed the evidence "taken as a whole," and was persuaded that

petitioners were selected for prosecution as "strike leaders," rather than as union officers. The Court of Appeals' view of the ultimate persuasiveness of evidence that petitioners were prosecuted as union officers is not relevant. It should have ended its consideration with the determination that evidence raised a "reasonable inference" that petitioners were selected for prosecution because they were union officers.[12] The Court of Appeals' failure to do so is grounded in its failure to articulate and apply the legal standard governing whether a "*prima facie* showing" had been made.

Moreover, it is apparent that the Court of Appeals, in order to determine that petitioners were prosecuted as strike leaders and not because they were union officers, engaged in an *assumption* that union officers were strike leaders. Such an assumption, not supported by record evidence, is entirely improper, and this Court has recently said so. The rationale of this Court's recent decision in *Metropolitan Edison Co.* v. *NLRB*, ____U.S.____, 51 U.S.L.W. 4350 (U.S. April 4, 1983) strongly suggests that discriminatory discipline may not be bottomed on an assumption that a union officer has instigated or led an illegal strike by the union membership.[13]

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[12]The Government's refusal to come forward with evidence to articulate or explain its basis for petitioners' selection for prosecution is fatal. See, e.g., *United States* v. *Berrios, supra* at 1212, fn. 4; *United States* v. *Steele, supra* at 1151-52. In that regard "an articulation not admitted into evidence will not suffice . . . (the Government) cannot meet its burden merely through an answer to the complaint over argument of counsel." *Texas Dept. of Community Affairs* v. *Burdine, supra* at 255, fn. 9.

[13]This rationale is apparent from this Court's seeming approval of cases permitting discriminatorily severe discipline of union officials where evidence shows that they have instigated or led illegal strikes, while otherwise disapproving more severe discipline for union officers in the context of an illegal work stoppage. See 51 U.S.L.W. at 4351, fn. 6.

In support of its conclusion that petitioners were selected for prosecution as "strike leaders," and not as union officers, the Court of Appeals could advert only to record evidence which it characterized as "suggest(ing) that (petitioners) all actively *participated in the August 3* strike . . . .", giving as an example conversation wherein an FAA supervisor asked petitioner Grant "if he and the union members planned to participate in the strike and Grant said yes . . . ." The court wrote that "an (FBI) agent could have *assumed* that (petitioner) Grant had urged his members to strike." (Emphasis added). (App. p. A-21). The Court of appeals referred to no other record evidence supporting the proposition that petitioners could be regarded as strike leaders.[14]

It is painfully clear from the Court of Appeals' Opinion that it could have concluded that petitioners were prosecuted as strike leaders *only* by engaging in the assumption that as union officers they had led or instigated the illegal strike. "Active" participation in a strike, in the absence of other evidence, does not amount to "leading" the strike. And the appellate court's suggestion that the FBI "could have assumed" that union officers were strike leaders constitutes clear proof that the court itself engaged in that assumption.

We repeat, such an assumption cannot be properly made under the law. It amounts to sanctioning prosecution of petitioners because they were union officers, and for no other reason. The Court of Appeals itself admits that status as union officers is an impermissible basis for selection for prosecution. Where other lower courts restricted their determination to

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[14]As noted earlier, the Court of Appeals in denying the Petition for Rehearing withdrew reliance on non-record documents inspected by the trial court *in camera*. See App. p. A-2. Reliance on other non-record materials would, of course, be equally improper.

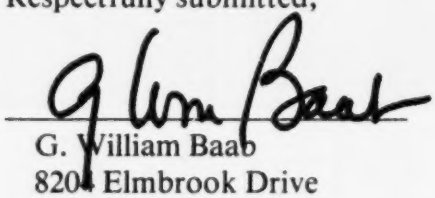
whether, on the record evidence before them, a *prima facie* showing of impermissible selective prosecution had been made, such a showing was found and outstanding indictments properly dismissed.[15] *United States* v. *McDonald, supra, United States* v. *Haggerty, supra.*

The selective prosecution issue posed herein warrants this Court's attention.

CONCLUSION

WHEREFORE a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,



G. William Baab
8204 Elmbrook Drive
Suite 200
Dallas, Texas 75247
(214) 630-3672

Of Counsel:
MULLINAX, WELLS, BAAB,
& CLOUTMAN, P.C.
8204 Elmbrook Drive
Suite 200
Dallas, Texas 75247

[15]The exception is *United States* v. *Amato, supra,* which stands as a sole reported instance in which the Government fully articulated by record proof a legitimate basis for selective prosecution. The Court of Appeals in the case at bar improperly relied on evidence introduced in *Amato* as basis for its conclusion that petitioners were selected for prosecution because they were "strike leaders" (See App. pp. A-21-22 fn. 15).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon counsel for Respondent, Mr. Ronald C.H. Eddins, Assistant U.S. Attorney, 310 U.S. Courthouse, 10th and Lamar Streets, Fort Worth, Texas 76102, by placing same in the United States mail, postage prepaid, on this the 25 day of May, 1983.

G. William Baab

FIFTH CIRCUIT'S OPINION ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gary GREENE, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Harry L. GRANT, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald A. MAY, Defendant-Appellant.

Nos. 81-1625, 82-1003 and 82-1005.

United States Court of Appeals,
Fifth Circuit.

April 4, 1983.

Appeals from the United States District Court
for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion Jan. 31, 1983, 5 Cir., 1983, 697 F.2d 1229).

Before BROWN, WISDOM, and RANDALL, Circuit Judges.

PER CURIAM:

In denying the Petition for Rehearing in the above-captioned cases, this Court would point out that it in no way utilized or relied upon the *in camera* materials submitted in the District Court (*See* 697 F.2d at 1238 and note 15) for a determination that defendants Grant, Greene and May were prosecuted as strike leaders rather than as union officials. Having failed to find evidence in the record sufficient to make out a *prima facie* case of selective prosecution, this Court examined the *in camera* materials in an attempt to discover if they contained information which might indicate prosecution on some impermissible ground. Finding none, we affirmed the judgment of the District Court.

The Petition for Rehearing is DENIED and no member of this panel not Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

FIFTH CIRCUIT'S OPINION OF JANUARY 31, 1983

Jan. 31, 1983.

Defendants, three air traffic controllers employed by the United States Government, were convicted in United States District Court for the Northern District of Texas, Eldon B.

Mahon, J., of violating statute prohibiting United States government employees from participating in a strike against the Government, and they appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) indictiments stated facts sufficient to constitute an offense against the United States; (2) the statute was not void for vagueness; and (3) defendants failed to prove impermissable selective prosecution.

Affirmed.

1. Indictment and Information—71.4(1)

Indictments charging defendants, former air traffic controllers, with violating statute prohibiting United States Government employees from participating in a strike against the Government stated facts sufficient to constitute an offense against the United States, and properly gave defendant sufficient notice of the charge to permit him to prepare a defense and established extent to which the prosecution would bar other proceedings. 18 U.S.C.A. § 1918(3).

2. Indictment and Information—60, 71.2(1)

An indictment need only contain elements of offense charged, apprise defendant of what he must be prepared to meet, and, in case other proceedings are taken against him, show accurately extent to which he may plead the earlier proceedings.

3. Criminal Law—13.1(1)

To pass constitutional muster, a statute must give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden.

4. Labor Relations—1052

Statute prohibiting United States Government employees from participating in a strike against the Government was not

unconstitutionally vague since it gave fair warning to federal employees that no person may strike against the Government while holding a government job without being subject to criminal prosecution and penalties; result was not vitiated by statute's alleged failure to define phrase "hold a position" or failure to set a time frame in which proscribed conduct must occur or one for "holding a position." 18 U.S.C.A. § 1918(3).

5. Criminal Law—31

To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing same acts have not; if defendant meets this showing, he must then demonstrate that Government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or desire to prevent his exercise of constitutional rights.

6. Criminal Law—31

Mere exercise of some selectivity by Government in instituting prosecutions is not itself a constitutional violation and, absent an invidious purpose, selection of cases for close investigation and for prosecution is not impermissible merely because it focuses upon those most vocal in encouraging concerted action to violate the law.

7. Criminal Law—31

Defendants who allege impermissible selective prosecution bear very heavy burden in demonstrating invidious purpose which invades or overrides prosecutorial discretion, especially in light of presumption that a criminal prosecution is undertaken in good faith.

8. Criminal Law—31

Prosecution of strike leaders or highly visible local opponents who are also union officials does not in and of itself indicate impermissible selection or invidious discrimination.

9. Labor Relations—1060

In prosecution of air traffic controller union officials for violating statute prohibiting United States Government employees from participating in a strike against the Government, defendants failed to prove that they were prosecuted for their protected union activities, rather than for their actions as leaders and organizers of an illegal strike, and defendants failed to demonstrate sufficient bad faith or invidious discrimination to make out a prima facie case of selective prosecution. 18 U.S.C.A. §1918(3).

Appeals from the United States District Court
for the Northern District of Texas.

Before BROWN, WISDOM and RANDALL, Circuit Judges.

JOHN R. BROWN, Circuit judge:

This is an appeal by three air traffic controllers employed by the United States Government in the Dallas-Fort Worth area. They were convicted under 18 U.S.C.A. § 1918 for participating in a strike while employed by the federal government. Because we find that the indictments state facts constituting a crime, the statute itself is not void for vagueness, and the selection of defendants for prosecution did not violate equal protection such that dismissal of the indictments was warranted, we affirm.

Defendants Grant, Greene and May are all former air traffic control specialists who were officers of their local Professional Air traffic Controllers (PATCO) union chapters.[1] On August 3, 1981, after seven months of highly publicized but unsuccessful negotiations with the Department of Transportation, the defendants, among approximately 13,000 PATCO members nationally and 300 in the Dallas-Fort Worth area, failed to report to work. Defendants were indicated for violation of 18 U.S.C. § 1918(3), which prohibits United States Government employees from participating in a strike against the government.[2] Defendants were convicted, committed to the custody of the Attorney General of the United States for a period of one year and one day,[3] and assessed a fine of $750 each.

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[1]At the time of the strike, Grant was president of PATCO Local 402 and Greene was president of PATCO Local 442. May, past president of PATCO Local 402, held that position from July, 1980 to June, 1981.

[2]18 U.S.C. § 1918 provides that:
"whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the government of the United States if he—. . .
(3) participates in a strike or asserts the right to strike against the government of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."
5 U.S.C. § 7311 provides that:
"an individual may not accept or hold a position in the government of the United States . . . if he—. . .
(3) participates in a strike or asserts the right to strike against the government of the United States . . ."

[3]The Court ordered that the first 90 days of the sentence imposed be served in an institution designated by the Attorney General. The remainder of the sentence was suspended and the defendants placed on probation for a period of 18 months following their release from confinement.

Attacking their convictions, defendants are now before the Court contending that the District Court erred in not dismissing the criminal complaints and indictments, pursuant to F.R.Crim.P. 12(b)(1) and (2), on the grounds that: (a) the indictments against them do not state facts sufficient to constitute an offense against the United States; (b) 18 U.S.C. §1918 is void for vagueness; and (c) the government's prosecutions of Grant, Greene and May were impermissibly selective.

Strike 1: Statutory Construction

[1] The defendants argue as their first basis for appeal that as a matter of statutory construction 18 U.S.C. § 1918(3) does not prohibit or penalize striking by government employees but merely states as a condition of employment that if federal workers strike, they may not accept or hold positions in the federal government. Thus, they argue that defendants' indictments do not state facts constituting a crime. While defendants' argument may have some validity for 5 U.S.C. §7311(3), the civil statute forming the basis for 18 U.S.C. § 1918(3), it has no application to § 1918(3) itself.

The statute under which this prosecution is brought (18 U.S.C. § 1918(3)) is quite plainly a criminal statute. The penalty for violating the statute includes imprisonment for as much as one year and a day,[4] or a fine of $1,000 or both. Second, the statute is included in Title 18 of the United States Code which is entitled "Crimes and Criminal Procedure." Title 18 is concerned only with crimes, the prosecution of

[4]Congress, in using the "year-and-a-day" term—a phrase which has meaning only in the context of criminal violations—obviously intended that a violation of § 1918 be classified as a felony criminal offense.

crimes, the administration of criminal justice and the disposition of criminal cases. Title 18 does not deal with the administrative framework of the government or its agencies, with conditions of employment or with the rights, privileges and obligations of civil servants. Moreover, § 1918 is included in Chapter 93 which contains 23 separate sections, each of which defines a crime relating to the acts of public officers and employees. For all these reasons, it is quite unlikely that Congress intentionally or inadvertently inserted a civil statute defining conditions of employment in the middle of a federal criminal code.[5]

Concern for efficiency also dictates this result. If Congress had had in mind to create a condition of employment in § 1918, it could have restricted itself to the sole remedy of terminating the employment of employees who disregarded that condition. It defies logic to assume that Congress intentionally provided criminal penalties against striking workers simply for holding a position in the government when terminating their employment would be an easier and far more appropriate remedy.

Several courts, in passing on this provision, have also suggested that § 1918 is a penal provision prohibiting striking against the government. *See e.g., Air Traffic Association of America v. PATCO,* 516 F.Supp. 1108, 1110 (E.D.N.Y.) *aff'd* 667 F.2d 316 (2d Cir. 1981) ("strikes by federal employees continued to be illegal . . . and indeed criminal . . ."); *United States v. PATCO,* 504 F.Supp. 432, 440 (N.D.Ill.1980), *reversed on other grounds,* 653 F.2d 1134 (7th Cir. 1981) ("[I]t is absolutely clear that a federal employee who strikes . . . may be prosecuted under 18 U.S.C. § 1918"); *Air Transport Association of America v. PATCO,* 453 F.Supp. 1287, 1293 n. 8 (E.D.N.Y.), *aff'd* 594 F.2d 851 (2d Cir. 1978), *cert.*

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[5] *See* 80 Stat. 608-09 (1966), where Congress explicitly added § 1918 to Title 18.

denied, 441 U.S. 944, 99 S.Ct. 2163, 60 L.Ed.2d 1046 (1979) ("[I]t is also the sworn duty of the Attorney General to enforce these laws [§§ 7311, 1918] but for reasons not fathomable by this Court they have apparently yet to initiate any investigative or enforcement proceedings"); *Air Transport Association v. PATCO,* 313 F.Supp. 181, 185 (E.D.N.Y. 1970) *vacated in part on other grounds sub nom, United States v. PATCO,* 438 F.2d 79 (2d Cir. 1970), *cert. denied,* 402 U.S. 915, 91 S.Ct. 1373, 28 L.Ed.2d 661 (1971) ("the federal law makes it a crime for a government employee to participate in a strike . . ."); *see also* H.Rep. No. 1152, 84th Cong., 1st Sess. 2(1955); S.Rep. No. 1256, 84th Cong., 1st Sess. 1(1955), and 23 A.L.R. Fed. 618 § 7 (1975) for a discussion of cases not involving air controllers which refer to a strike as a crime under § 1918 while applying § 7311.

[2] The indictment, then, was sufficient. Participation in a strike by a government employee is a crime under 18 U.S.C. § 1918, and the indictment charged participation in a strike in violation of that section. The indictment need only contain the elements of the offense charged, apprise the defendant of what he must be prepared to meet, and, in case other proceedings are taken against him, show accurately the extent to which he may plead the earlier proceedings. *Webb v. United States,* 369 F.2d 530, 535-36 (5th Cir.1966). Here the elements of the offense are striking and being a government employee. The indictment charges both. It gives the defendant sufficient notice of the charge to permit him to prepare a defense, and it establishes the extent to which the prosecution will bar other proceedings.

Strike 2: Vagueness

Defendants argue as their second basis for appeal that

Congress, by facially prohibiting employment of strikers, instead of strikes by employees, and by failing to define the phrase "hold the position" or the time frame in which it operates, rendered 18 U.S.C. § 1918(3) unconstitutionally void for vagueness.

[3] To pass constitutional muster, a statute must give persons of ordinary intelligence fair notice that their contemplated conduct is forbidden by statute. *Papachristou v. City of Jackson,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Bouie v. City of Columbia,* 378 U.S. 347, 348, 351, 84 S.Ct. 1697, 1699, 1701, 12 L.Ed.2d 894 (1964). *United States v. National Dairy Products Corp.,* 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *see Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1952); *Stansberry v. Holmes,* 613 F.2d 1285 (5th Cir.1980); *United States v. Mikelburg,* 517 F.2d 246, 252 (5th Cir.1975) *cert. denied,* 424 U.S. 909, 96 S.Ct. 1104, 47 L.Ed.2d 313 (1976); *Turf Center, Inc. v. United States,* 325 F.2d 793 (9th Cir.1963).

Defendants argue that § 1918 fails to give fair warning to potential strikers that they will be subject to criminal penalties for participating in a strike. They suggest that federal employees who choose to strike could reasonably believe that they would not be subject to criminal penalties so long as they did not subsequently attempt to return to work.

[4] Defendants' argument is premised on the idea that § 1918 prohibits only employment of strikers and not strikes by government employees.[6] As the preceding discussion

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[6]The force of defendants' argument is diminished by the provisions of 5 U.S.C. § 3333, which require that a federal employee execute an affidavit

suggests, however, such a premise is flawed. It is true that § 1918 includes a condition of employment in its reference to § 7311. As one court pointed out, "Section 7311 must however be considered in conjunction with 18 U.S.C. § 1918, which makes an individual's violation of its provisions a crime . . . thus the specific statutory consequences of an individual employee's strike participation is his or her potential termination of employment under Section 7311 *and* potential prosecution under 18 U.S.C. § 1918." (emphasis added). *United States v. PATCO,* 504 F.Supp. at 438. Reading § 1918 in this manner, we hold that the statute (§ 1918) is not unconstitutionally vague since it gives fair warning to federal employees that no person may strike against the government while holding a government job without being subject to criminal prosecution and penalties. *United States v. Amato,* 534 F.Supp. 1190 (E.D.N.Y.1982); *United States v. Haggerty,* 528 F.Supp. 1286 (D.Colo.1981). *See also Air Traffic Association,* 516 F.Supp. at 1110; *Air Transport Association,* 453 F.Supp. at 1294.

This result is not vitiated by defendants' contention that the failure to define the phrase "hold a position" renders the

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(footnote continued)
upon appointment stating that he is not striking and will not do so. Grant, Greene and May all executed the following affidavit:

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof. I do not and will not assert the right to strike against the Government of the United States or any agency thereof while an employee of the Government of the United States or any agency thereof. I do further swear (or affirm) that I am not knowingly a member of an organization of Government employees that asserts the right to strike against the Government of the United States or any agency thereof and I will not, while an employee of the Government of the United States or any agency thereof, knowingly become a member of such an organization.

statute unconstitutionally vague. We agree with the court in *Amato* that "the plain meaning of the words 'holds a position' in § 1918(3) is that a person 'holds a position' when he is currently employed by the federal government."[7] *Amato*, 534 F.Supp. at 1199.

Moreover, the fact that the statute does not set a time frame in which the proscribed conduct must occur or one for "holding a position" does not render it impermissibly vague. As suggested by the Government in its brief, the time frame in which 18 U.S.C. § 1918 applies is "anytime." We can find no statutory or judicially imposed requirement that every statute include a specific timetable for its violation and we refuse to impose such a requirement here. Thus, we hold that the Constitution is not offended by the provisions of 18 U.S.C. § 1918.

Strike 3: Selective Prosecution

[5] Defendants argue as their third basis for appeal that the indictments against them should be dismissed because their selective prosecution denied them equal protection of the laws. To prevail on a selective prosecution challenge, a defendant must make a *prima facie* showing that he has been singled out

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[7] Sections 7311(3) and 1918(3) have already been the subject of judicial scrutiny by a federal district court which held that they were not void for vagueness or overbreadth. *United Federation of Postal Clerks v. Blount*, 325 F.Supp. 879, 884-85 (D.D.C.), *aff'd mem.*, 404 U.S. 802, 92 S.Ct. 80, 30 L.Ed.2d 38 (1971). In its holding, the court construed the term "holds a position" when it stated, "It is only the actual refusal by [federal] employees to provide services that is forbidden by 5 U.S.C. § 7311 and criminalized by 18 U.S.C. § 1918(3)." The court pointed out further that "the federal courts have broad latitude to construe a [federal] statute in such terms as will save it from the infirmities of vagueness and overbreadth." *Id.* at 885.

for prosecution while others similarly situated and committing the same acts have not. *United States v. Rice,* 659 F.2d 524, 526 (5th Cir.1981); *United States v. Tibbetts,* 646 F.2d 193, 195 (5th Cir.1981); *United States v. Lichenstein,* 610 F.2d 1272, 1281 (5th Cir.), *cert. denied,* 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980). If a defendant meets this first showing, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. *Rice,* 659 F.2d at 526; *Tibbetts,* 646 F.2d at 195; *United States v. Kahl,* 583 F.2d at 1351, 1353 (5th Cir.1978); *United States v. Johnson,* 577 F.2d 1304, 1308 (5th Cir.1978). *See United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir.1974).

The record in this case indicates that defendants have met the first part of the test for selective prosecution. Of the approximately 300 air traffic control specialists who failed to report for work in the Dallas-Fort Worth area, only six individuals, including the three defendants here, were prosecuted. Unlike the situation in the Fifth Circuit selective prosecution cases involving tax protestors where the government argued that it had prosecuted all *known* violators,[8] the United States here acknowledges that there was some selectivity in singling out the defendants for prosecution. Thus, the focus of this case shifts to the second part of the selective prosecution test which examines the reasons why the defendants, and not others, were prosecuted.

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[8] *United States v. Brewer,* 681 F.2d 973 (5th Cir.1982); *Rice,* 659 F.2d 524; *Tibbetts,* 646 F.2d 193; *Kahl,* 583 F.2d 1351; *Johnson,* 577 F.2d 1304.

[6] We begin this inquiry by recognizing that the mere exercise of some selectivity by the government in prosecution is not itself a constitutional violation. *Rice,* 659 F.2d at 527; *see Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962). Moreover, absent an invidious purpose, selection of cases for close investigation and for prosecution is not impermissible merely because it focuses upon those most vocal in encouraging concerted action to violate the law. *Rice,* at527; *Johnson,* 1309; *Tibbetts,* at 195. Thus, defendants' status as PATCO officials should not immunize them from prosecution as strike leaders under § 1918(3). As one court explained:

> To hold so would be to eviscerate the enforcement of § 1918, all union leaders who are also strike leaders would escape prosecution while strike leaders from the rank and file would have no such protection. Union leadership may not be used as a shield to prosecution under § 1918(3) . . . Aggressive display of opposition to a law and blatant defiance of authorities, challenging them to prosecute, should not give rise to immunity from prosecution.

Amato, 534 F.Supp. at 1195; *see United States v. Rickman,* 638 F.2d 182, 183 (10th Cir.1980); *United States v. Stout,* 601 F.2d 325, 328 (7th Cir.), *cert. denied,* 444 U.S. 979, 100 S.Ct. 481, 62 L.Ed.2d 406 (1979). Moreover, one court has even suggested that potential media attention may be a legitimate basis for selection for prosecution. It held that:

> selection for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws. Since the government lacks the means to investigate every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media.

United States v. Catlett, 584 F.2d 864, 868 (8th Cir.1978). *See also United States v. Ness,* 652 F.2d 890, 892 (9th Cir.1981); *Johnson,* 577 F.2d at 1309.

[7] Such holdings are justified on the grounds of the separation of powers. Since the decision to prosecute one person rather than another is one left to executive discretion, *see* F.R.Crim.P. 48(a) and (b); *United States v. Cox,* 342 F.2d 167 (5th Cir.) (en banc), *cert. denied sub nom, Cox v. Hauberg,* 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965), the courts are both reluctant and restricted in any review of prosecutorial decisions. In fact, at least one circuit court has held that the decision to prosecute is simply not reviewable, and that it is not a function of the judiciary to review the exercise of executive discretion in this regard, *Newman v. United States,* 382 F.2d 479, 482 (D.C. Cir.1967). Though we do not adopt the "no-review" rule of the D.C. Circuit, we do point out that defendants bear a very heavy burden in demonstrating invidious purpose which invades or overrides that prosecutorial discretion. This is especially true since there is a presumption that a criminal prosecution is undertaken in good faith.[9] *United States v. Ojala,* 544 F.2d 940, 943 (8th Cir.1976), *United States v. Falk,* 479 F.2d 616, 620 (7th Cir.1973).

Though it should be apparent from the preceding discussion that making such a *prima facie* showing of selective prosecution is a difficult task, it is unclear what the precise nature of

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[9]We acknowledge that the court in *United States v. Haggerty,* 528 F.Supp. at 1291 n. 4, pointed out that "the PATCO cases are the first selective prosecution cases where employees are being prosecuted for employment related activities and the government is both employer and prosecutor. This unique factual situation might suggest that the usual presumption of good faith in instituting prosecutions is entitled to less than its ordinary weight."

the showing should be. This is true, in part, because so few parties have succeeded in shifting the burden of proof to the government. *See United States v. Falk,* 479 F.2d 616 (7th Cir. 1973); *United States v. Steele,* 461 F.2d 1148 (9th Cir.1972). In fact, we are not aware of any case in this circuit in which a defendant has made a *prima facie* showing of discriminatory purpose.In those cases in other circuits where the government has been required to demonstrate a legitimate basis for selection, the courts have required evidence creating "a strong inference of discriminatory prosecution." *Steele,* at 1152. Therefore, an examination of the cases cited above where defendants have been successful, at least in part, in shifting the burden of proof to the government would be instructive.

In *Steele,* the defendant was prosecuted and convicted for refusing to answer questions on the Department of Commerce Census form of 1970. The defendant demonstrated that only members of a census resistance movement had been prosecuted, although the government was aware of other people who had failed to fill out the forms. All of those prosecuted had publicized their opposition to the census. Steele introduced further evidence that

> Leland Gray, the Regional Technician for the census in Hawaii, described the four as "hard core resisters." He ordered his staff to compile special background dossiers on them, a discretionary procedure not followed with any other offenders. Gray testified that his organization had been very concerned about the census resistance movement.

461 F.2d at 1151. The government offered no explanation for its selection of the four, other than prosecutorial discretion. The Ninth Circuit reversed Steele's conviction, holding that Steele had created a strong inference of discriminatory prosecution which the government had failed to explain away. *Id.* at 1152

In *Falk,* the defendant was convicted on three counts relating

to the failure to possess a draft card and on a fourth count, for refusing to submit to induction.[10] Falk was an active member of a draft counseling organization. He alleged that the government decided to prosecute him "to punish him for and stifle his and others' participation in protected first Amendment activities in opposition to the draft and the war in Vietnam." 479 F.2d 619-20. Falk claimed that there were 25,000 people who had dispossessed themselves of their draft cards without facing criminal sanctions. He presented documentary evidence of an agreement between the military and the Department of Justice that they would not prosecute registrants who turned in their draft cards rather than burning them. *Id.* at 621. Further, the decision to prosecute Falk had been approved not only by the Assistant United States Attorney, but also by various superiors all the way to the Department of Justice in Washington. The Seventh Circuit found it "difficult to believe that the usual course of proceedings in a draft case requires such careful consideration by such a distinguished succession of officials prior to a formal decision to prosecute." *Id.* at 622.

Thus, the Seventh Circuit held that Falk had made out a *prima facie* case of improper selective prosecution and remanded for a hearing at which the government would have an opportunity to prove that its decision to prosecute had not been based on improper criteria:

> The unrebutted evidence before the court, including the admission of the Assistant United States Attorney and the two published statements by the Selective Service officials which contradict the propriety of the action taken in this case, made out at least a *prima facie* case of improper discrimination in enforcing the law.

479 F.2d at 623.

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[10]The district court granted a pots-trial motion for acquittal on the induction count on the ground that there had been no basis in fact for denying Falk classification as a conscientious objector.

[8] In *Steele* and *Falk*, the defendants established that they had engaged in protected first amendment activity, that they had been singled out for prosecution although the government was aware that others had violated the law, and that the government had followed unusual discretionary procedures in deciding to prosecute. In the instant action, defendants maintain that they were prosecuted for protected union activities.[11] We agree with defendants that the government cannot prosecute them for engaging in protected activities; thus, they cannot be prosecuted solely on the basis of their status as union officials. On the other hand, defendants cannot talk themselves into immunity from prosecution for otherwise illegal activities. We state categorically that prosecution of strike leaders or highly visible vocal opponents, who are also union officials, does not in and of itself indicate impermissible selection or invidious discrimination. *See Rice*, 659 F.2d at 527; *Johnson*, 577 F.2d at 1409; *Tibbetts*, 646 F2d at 195. As the district court stated in *United States v. Amato*, 534 F.Supp. 119: "It does not follow that merely because union leadership may be highly correlated with strike leadership that the government's decision to target strike leaders is invidiously discriminatory."

The record in this case indicates that defendants were

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[11] Union participation by federal employees is a protected activity. 5 U.S.C. § 7102 provides:

> Each employee shall have the right to form, join or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right (1) to act for a labor organization in the capacity of a representative and the right, in that capacity to present the views of the labor organization . . .

The right to organize and to select representatives to engage in collective bargaining is also constitutionally protected. *See United Federation of Postal Clerks v. Blount*, 325 F.Supp. 879, 883 (D.D.C.), *aff'd mem.*, 404 U.S. 802, 92 S.Ct. 80, 30 L.Ed.2d 38 (1971).

prosecuted on the basis of their status as strike leaders, not as union officials. Defendants called two witnesses, Edmond R. Johnson and Donald Kneram.[12] Kneram had talked with FBI agents about Greene, and Johnson testified to a conversation with FBI agents concerning Grant and May. All of these conversations apparently took place after the nationwide work stoppage. Both Johnson and Kneram testified to statements made by defendants concerning their participation in the August strike. The witnesses testified that defendants had not reported for work on August 3, 4 and 5, 1981. In addition, both Johnson and Kneram reported that they had told FBI agents of defendants' union activities and of their status as PATCO officials. When Johnson was called by the government in support of its case against Grant, the following exchange occurred on redirect:

> Q. Mr. Baab, the defense attorney, referred to questions you were asked by the FBI relative to the president of the union. Were you also requested to assist the FBI in identifying people that were strike leaders?
>
> A. I was asked to identify personnel who were officers and representatives within the union.

Record, Vol. III, at 86. This information was later included in the affidavits supporting the criminal complaints against Grant, Greene and May.[13]

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[12] Edmond R. Johnson was employed by the Department of Transportation, Federal Avaition Administration, as Chief of the Aircraft Control Center in the Dallas-Fort Worth area. Donald K. Kneram was also employed by the Federal Aviation Administration as Chief of the Dallas-Fort Worth tower.

[13] The following representative affidavit contains the following statements:

2. Mr. Johnson told this affiant that HARRY L. GRANT is an

Defendants insist that because information concerning their union status was transmitted to the FBI and was reported in the affidavits supporting their indictments, they have made a showing of invidious discrimination or bad faith sufficient to shift the burden of proof on selective prosecution to the government. They contend that such evidence, combined with an alleged "pattern" of prosecution of union officials in the Dallas-Fort Worth area, gives rise to the inference that prosecution of defendants was based on their assertion of the right to strike and their union activities. We do not agree.

Taken as a whole, the evidence tends to establish that the government instituted the prosecutions of Greene, Grant and

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Air Traffic Control specialist and has been for at least ten years employed by the Federal Aviation Administration. Mr. Johnson told this affiant that on June 15, 1981, HARRY L. GRANT informed Mr. Johnson that he was the President and Facility Principle Representative for Local 402 of P.A.T.C.O., which is the Professional Air Traffic Controllers Organization.

3. Mr. Johnson told this affiant that on August 2, 1981, between 4:30 and 5:00 P.M., Mr. Johnson met with HARRY L. GRANT at the Air Route Traffic Control Center in Tarrant County, Texas, and HARRY L. GRANT told Mr. Johnson that P.A.T.C.O., Local 402, was intending to strike and was going to go on strike on August 3, 1981. GRANT told Mr. Johnson, according to Johnson, that GRANT would be one of those members of P.A.T.C.O., Local 402, that would go out on strike against the United States Government. Mr. Johnson told this affiant that HARRY L. GRANT was regularly scheduled to work at the Air Route Traffic Control Center, Tarrant County, Texas, at 8:00 A.M. on August 3, 1981. Mr. Johnson told affiant that GRANT failed to report for work and did not call in sick nor on annual leave was he temporarily assigned to another Air Traffic Control Facility.

May because defendants were strike leaders, not because of their status as union officials. The testimony of Kneram and Johnson, which defendants assert establishes selective prosecution, also suggest that Grant, Greene and May all actively participated in the August 3 strike. For example, Johnson testified that he informed the FBI agent about a conversation that he had had with Grant on the evening before the strike. Johnson had asked Grant if he and the union members planned to participate in the strike and Grant said yes. The agent could have assumed that Grant had urged his members to strike.[14] Further, in addition to live testimony, the court had, for *in camera* inspection, a number of files and materials that were in the hands of the government, supplied to the court in response to a demand by defendants. In those materials, the government consistently refers to strike leaders, not union officials, as the targets of prosecution.

[9] Defendants made no showing that the government was aware of any strike leaders, whether union officials or rank-and-file members, whom it did not prosecute. Neither have they made any showing that the government failed to follow its own established policy of non-prosecution, as was the case in *Falk* and *Haggerty*.[15] We conclude on the basis of the record

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[14]Since the issue in this case is whether the government had a discriminatory purpose in prosecuting defendants, inquiry into the agent's assumptions rather than Grant's actual actions is critical.

[15]The *in camera* materials do suggest "targeting" of strike leaders before the strike actually occurred, as in other PATCO cases, *see Amato*, 534 F.Supp. 1190; *Haggerty*, 528 F.Supp. 1286. There is, however, no evidence that the defendants in this case were specifically targeted *before* they broke the law by participating in the work stoppage. Further, PATCO members made no

before us, that defendants have not proven that they were prosecuted for their protected union activities, rather than for their actions as leaders and organizers of an illegal strike. Lacking any further indication that defendants were selected for prosecution on some impermissible ground, we hold that defendants failed to demonstrate sufficient bad faith or invidious discrimination to make out a *prima facie* case of selective prosecution. On that basis, we hold that the district court was correct in not dismissing defendants' indictments on grounds of selective prosecution.

AFFIRMED.

(footnote continued)

secret of their plan to engage in massive criminal violations, and we cannot say that it was an abuse of prosecutorial discretion for the Department of Justice to prepare to investigate those who had admittedly planned and urged others to engage in the illegal strike, particularly a strike which could have threatened the safety of the air traveling public, as well as the country as a whole.

November 16, 1981
Proceedings before U.S. District Court

The following proceedings were had on November 16, 1981:

THE COURT: Before calling the docket, the Court heard motions on Thursday concerning Criminal Action 4-81-108, The United States vs. Ronald A. May, 4-81-109, United States vs. Charles J. Phillips, CR4-81-110, United States vs. Gary P. Laws, Criminal Action 4-81-111, United States vs. Harry L. Grant, Criminal Action 4-81-112, United States vs. Gary Greene and Criminal Action 4-81-113, United States vs. Sam Anselm. And before proceedings with calling the docket the Court wishes to make a ruling on the motions that the Court heard on Thursday concerning those six named cases I just called.

Of course this is a motion filed by the defendants to dismiss their case on several grounds. The defendants raise three issues in their motion to dismiss.

One is that the statute involved does not provide for criminal penalties under the circumstances of this case.

And, two, if the statute does provide for criminal penalties then the statute is void for vagueness.

And, three, the defendants were selected for prosecution for improper reasons.

The Court, very briefly, is going to deal with these matters raised by the defendants' motion to dismiss.

The statutory interpretation is what is called for relative to the first issue.

The plain meaning of 18 USC Section 1918 is clear. Section 1918 provides that whoever violates the provisions of Section 7311 of Title Five shall be fined not more than $1,000, or imprisoned for not more than one year and a day, or both.

The violation of Section 7311 that is applicable in this case

is that an individual may not accept or hold a position in the government of the United States if he participates in a strike against the government of the United States.

Therefore, a person violates the statute if he holds a position in the government of the United States and participates in a strike.

In other words the statute does not prohibit, per se, the strike against the government, but prohibits a person from constitutionally holding a position with the government and participating in the strike against the government. That is precisely what these defendants are charged with in the indictment now pending before this Court.

The defendants, allegedly, participated in a strike against the United States government on August 3, 1981. Also, on August 3, 1981, the defendants were allegedly holding a position with the government.

Therefore, those alleged facts, if proven beyond a reasonable doubt, would be in violation of Chapter 1918, which these defendants are charged with violating in an indictment pending before the Court.

Although there has been no case construing the criminal statute, the Court's interpretation is consistent with other recent decisions and the Court's interpretation is consistent with both the Senate and the House report on the statute involved.

Reference is made to United States vs. PATCO, 504 Federal 2nd, 432, which is a Northern District of Illinois 1980 case which was reversed on other grounds not relevant to this particular motion.

Then No. 80-2854 slip opinion, at Page 20. This is the Seventh Circuit in 1981.

Also Air Transport Association vs. PATCO, 454 Fed 2nd 1207, an Eastern District of New York case. This is affirmed by the Second Circuit in 1978 at 594 Fed 2nd 851.

And then House Report No. 1152, 84th Congress, First Session 2 (1955) and then Senate Report No. 1256, 84th

Congress, First Session 2 (1955).

The Court hereby holds that 18 USC, Section 1918 does prohibit an employee of the government from participating in a strike against the government.

Now the next issue, Section 1982 is not constitutionally vague, as contended by the defendant. The defendants claim that even if Section 1918 does proscribe the conduct involved in those present cases, the statute is so vague as to be unconstitutional. Any statute or ordinance which proscribes certain conduct must be sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and to avoid the possibility of arbitrary and erratic arrests and convictions. A provision need not, however, be cast in terms that are mathematically precise. It need only give fair warning of the conduct proscribed, in light of common understanding and practices. I was citing Stansberry v. Holmes, 613 Federal 2nd 1285, and 1289, a Fifth Circuit case in 1980. Cert. was denied in that case at 101 Supreme court, 240.

Also reference is made to United States vs. National Dairy Products Corporation, 372 US 29, a 1963 case.

And then Grayned vs. City of rockford, 408 US 104, a 1971 case and Papachristou vs. The City of Jackson, 405 US 155, a 1971 case.

Now the defendants first assert that nothing contained in Section 1918 or 7311 inform federal employees that an act of striking leads to criminal penalties.

The Court has already stated that such 1918 clearly says it is a violation if an individual holds a position with the government and participates in a strike. It is very clear. Therefore, federal employee's act of striking will lead to criminal penalties.

The defendants next assert that the statute is unclear of when an individual has to hold a position in the government and be in violation of Section 1918.

Defendants claim that the statute should be read to mean

that an individual is only subject to the statute if he first strikes and then holds a position with the government.

Or the defendants claim that the statute should mean that an individual has to hold a position in the government and participate in a strike contemporaneously in order to be in violation of the law.

Now certainly the Court admits and agrees that the language of the statute is not the best-worded statute in the books. It is, maybe, not as clear as possible, or at least as clear as some of the prior statutes in the section.

However, the Court finds that the language of Section 1918 is sufficiently definite to give a person of ordinary intelligence a fair notice that his contemplated act of striking while a federal employee is forbidden by Section 1918.

Thus the Court holds that any one of the PATCO strikers, if they had read Section 1918, would have been given fair warning that if they participated in a strike they would be subject to criminal penalty. It is extremely clear on this point.

Now the defendants finally assert that Section 1918 is unclear as to who is subject to penalty. The defendants claim there are four distinct categories of employees who could have been subject to penalty. Whether or not this is true, as the Court previously stated, the statute clearly implies that individuals, any individuals who, while holding a position with the government, participate in a strike. Thus the Court holds that a person of ordinary intelligence would know he was subject to the statute.

Now the next issue that the defendants claim relates to the selective enforcement of the statute, selective prosecution. The defendants claim they were improperly selected for prosecution.

To prevail in a selective prosecution issue a defendant must make a prima facie showing that he was singled out for prosecution while others similarly situated and who committed the same acts were not being prosecuted. That is United States v. Tibbits, 646 Fed 2nd 193. See also United States v. Lichenstein,

610 Fed 2nd 1272, likewise a Fifth Circuit case in 1980 in which cert. was denied by the United States Supreme Court.

Now if the defendants meet the prima facie showing he must then show that the government's discriminatory selection of him for prosecution has been invidious, or done in bad faith. Again, this is the holding of the Tibbits case, United States vs. Tibbits, 646 Fed 2nd, 193.

Now while the defendants have probably met the first part of this test, that they were singled out among the 250 strikers for prosecution, and all 250 committed the same act, however, the defendants have not shown that they were singled out for any indivious reasons, or that the government acted in bad faith in bringing cases against these six named defendants.

Also there was tendered to the Court for in camera inspection a number of files and material in the hands of the government. The Court has reviewed all of this material submitted to the Court for in camera inspection. The Court finds that none of the material supports the defendants' contention of selective prosecution.

The defendants claim that because they made public statements in protest against the government's conduct for the exercise of a constitutional right to assert the right to strike, and cite National Association of Letter Carriers vs. Blount, 305 Fed 2nd, 546, a D.C. circuit court case in 1969 which was affirmed without opinion at 404 U.S. 802.

However, such a selection is not impermissible solely because it focuses upon those most vocal in their opposition to the government's barring the strike procedure. Here again, this is holding in the Tibbits case, 646 Fed 2nd 193, and also The United States vs. Johnson, which is 577 Fed 2nd 1304 at 1309 which is a Fifth Circuit 1979 case. The government's prosecution of these defendants merely indicates a valid interest in pushing violators who flagrantly and vocally break the law. Again, that is the holding of the Tibbits case which the Court has already referred to.

Thus, taking all of the argument and the defendants' contentions that are made, the Court holds that the defendants were not impermissibly selected for prosecution.

Therefore, the Court hereby orders that all defendants' motions to dismiss, in their entirety, are hereby denied.

MR. BAAB: One point for clarification. Concerning your statement on the motion for in camera discovery, have those materials been made a part of the record?

THE COURT: Yes, I have them here and they will be made a part of the record for review, if that becomes necessary.

MR. BAAB: Thank you, Your Honor.

(End of hearing on motions.)

SENTENCING

I will now continue with the sentencing in Criminal Action 4-81-109, 4-81-110 and 4-81-113. You may step forward.

(PROCEEDINGS IN OTHER RELATED CASES NOT TRANSCRIBED HERE.)

THE COURT: The Court calls now Criminal Action No. 4-81-112, the United States versus Gary Greene. Defendant Greene, do you have anything that you would like to say to the Court at this time before final sentence is passed?

DEFENDANT GREENE: No, Your Honor.

THE COURT: It is hereby adjudged that the defendant, Gary Greene, in Criminal Action 4-81-112, is hereby committed

to the custody of the Attorney General or his authorized representative for imprisonment for a term of one year and one day, and assessed a fine in the amount of $750.00, and on the condition that the defendant will be confined in an institution to be designated by the Attorney General of the United States for a period of 90 days.

The execution of the remainder of the sentence of imprisonment only is hereby suspended and the defendant placed on probation for a period of 18 months, to commence upon the defendant's release from confinement after serving the 90 days.

The terms of probation will be under the usual regular normal conditions of probation which will be outlined to you by the probation officer at the time you go on probation.

The Court is going to recommend that the institution where you will serve that sentence will be the Federal Correctional Institute in Fort Worth, Texas. But I do not know whether they will accept my recommendation or not. The Bureau of Prisons has complete control of that. But that will be the recommendation of the Court.

Further, it will take sometime to get the official designation. The Court will give you until Monday, January 11, 1982, at which time you will report to the marshal's office in this building on the second floor, at 11:00 A.M. to commence the serving of the 90 days. That is the sentence of the Court. You may be seated.

The Court will continue with the sentencing of Defendant Harry L. Grant in Criminal Action 4-81-111. Defendant Grant, do you have anything you would like to say to the Court before sentence is passed?

DEFENDANT GRANT: No, sir.

THE COURT: It is hereby adjudged that the defendant, Harry L. Grant, in Criminal Action 4-81-111, is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a term of one year and one day, and assessed a fine in the sum of $750.00; and on condition that the defendant will be confined in an institution to be designated by the Attorney General of the United States for a period of 90 days.

The execution of the remainder of the sentence of one year and one day is hereby suspended and the defendant placed on probation for a period of 18 months, to commence upon the defendant's release from confinement after serving the 90 days.

The terms and conditions of release will be upon normal, regular terms and conditions of probation, which will be outlined to you by the probation officer at the time you go on—after you have served your 90 days.

The fine of $750.00 can be paid on a schedule to be worked out with the probation officer. And that also applies to the preceding case of the defendant Greene. I think I neglected to say that. You can work that out on a schedule to be worked out between you and the probation officer.

Likewise, the Court is going to recommend that the Federal Correctional Institute in Fort Worth be where you serve the sentence, but there is no way I can assure you that will be done because it is up to the Bureau of Prisons.

I will give you until January 11th, that is Monday, January 11, 1982, at 11:00 A.M., at which time you will report to the marshal's office on the second floor of this building to commence the serving of the 90 days confinement. You may be seated.

The Court now calls Criminal Action 4-81-108, the United States versus Ronald A. May, to continue with the sentencing.

Defendant May, do you have any statement you would like to make?

DEFENDANT MAY: No, Your Honor.

THE COURT: It is hereby adjudged that the defendant, Ronald A. May, in Criminal Action 4-81-108, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of one year and one day, and assessed a fine in the amount of $750.00; and further, on the condition that the defendant will be confined in an institution to be designated by the Attorney General for a period of the first 90 days.

The execution of the remainder of the sentence of imprisonment only is hereby suspended and the defendant placed on probation for a period of 18 months, to commence upon the defendant's release from confinement for the 90 day period. It will be on the regular, normal, usual terms and conditions of probation, which will be outlined to you by the probation officer at the time you go on probation.

The Court, again, will recommend the Federal Correctional Institution in Fort Worth, with the understanding that that is not within the final decision of the Court.

You will be given until Monday, January 11, 1982, at 11:00 A.M., at which time you will report to the marshal's office on the second floor of this building to commence serving your 90 day sentence.

The fine can be paid on a schedule to be worked out with the probation officer.

Now, I am going to let each defendant, that is May, Grant and Greene, remain on the bond you are on at this time until January 11th, under the same terms, conditions and provisions. I know you will comply with each and every one of those terms, conditions and provisions. Failure to do so certainly would not be in the interest of any of you, not to comply with those terms and conditions of release.

Also, for the record, the Court has the motion filed by the defendants May, Grant and Greene for acquittal—for judgment of acquittal after the discharge of the jury. I should have said this before I sentenced, but I overlooked it.

For the record, the Court has considered the motion for judgment of acquittal filed by the defendants Greene, May Grant, and having considered the facts, having considered the law, the motions for judgment of acquittal after discharge of the jury are overruled and denied.

That is the sentence of the Court. Let me advise the defendants Greene and Grant and May—will you please stand again? To the defendants Gary Lee Greene in Criminal Action 4-81-112 and to the defendant Harry L. Grant in Criminal Action 4-81-111, and to defendant Ronald A. May in Criminal Action 4-81-108, you are each advised that you have the right to appeal to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana. Notice of appeal must be filed within ten days after entry of judgment. In addition, you have ten days from today in which to file a notice of appeal.

If you are unable to pay the cost of appeal, you may apply to the Court for permission to proceed in forma pauperis—that is, without cost to you.

And if you request, the clerk of this court will file a notice of appeal in your behalf.

Now the clerk—will you give to each defendant a form, and I ask that each defendant sign that form, along with their attorney. It is only an acknowledgement on your part that you have been advised that you have the right of appeal and that you have ten days within which to file notice of appeal.

All right, Mr. Grant, you didn't date yours, but I will ask the clerk to date it today.

MR. GRANT: I think I dated it.

MR. GREENE: I believe it was mine.

THE COURT: Yes. All right, I have ordered the clerk to date it today.

That is the sentence of the Court in each of these cases.

I want to say to Mr. Baab I deeply appreciate the manner in which you have conducted yourself in this court, and Mr. Eddins. It is always a pleasure to have attorneys of your quality and your caliber to appear before this Court.

Court is adjourned.

END OF DOCKET